Petition

81-1336

NO.

Office - Supreme Court, U.S.
FILED
JAN 14 1982
ALEXANDER L. STEVAS,
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In the Supreme Court of the United States

OCTOBER TERM, 1981

CLAYTON R. PAGE, III,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Application for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does Rule 23(a) of the Federal Rules of Criminal Procedure require that a waiver of jury trial be in writing?

2. Does the Constitution require that a waiver of the right to a jury trial be intelligent, knowing, express and personal and does the failure of the trial judge to take steps to ascertain the presence of these essential elements require reversal?

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SUPREME COURT OF THE UNITED STATES

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PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

The Petitioner, Clayton R. Page, III, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the

Fifth Circuit, rendered in this proceeding on November 20, 1981.

OPINIONS BELOW

(a) Opinion of the United States Court of Appeals for the Fifth Circuit, dated November 20, 1981 (Appendix A).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was rendered on November 20, 1981. No rehearing was requested.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

(a) United States Constitution, Article 3, Section 2, Clause 3, provides:

Criminal Trial by Jury.

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes

> shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

(b) The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

(c) Rule 23(a) of the Federal Rules of Criminal Procedure provides:

> (a) **Trial by Jury.** Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

(d) Rule 23(c) of the Federal Rules of Criminal Procedure provides:

> (c) **Trial Without a Jury.** In a case tried without a jury the court shall make a general finding and

shall in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

(e) Rule 10(b)(3) of the Federal Rules of Appellate Procedure provides:

> (3) Unless the entire transcript is to be included, the appellant shall, within the 10 days time provided in (b)(1) of this Rule 10, file a statement of the issues he intends to present on the appeal and shall serve on the appellee a copy of the order or certificate and of the statement. If the appellee deems a transcript of other parts of the proceedings to be necessary, he shall, within 10 days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so

Rule 43(a) of the Federal Rules of Criminal Procedure provides:

> (a) **Presence Required.** The defendant shall be present at the arraignment, at the time of the plea,

> at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

STATEMENT OF THE CASE

On April 3, 1980, the United States of America filed an Indictment for Mail Fraud, Fraudulent Claims and False Statements, handed down by a grand jury charging Petitioner with twelve (12) counts thereunder. Petitioner pleaded not guilty on all counts on April 7, 1980 and was released on personal recognizance.

On June 13, 1980, the United States filed a Superceding Indictment in lieu of the Original Indictment for Mail Fraud, Fraudulent Claims and False Statements, charging Petitioner with ten (10) counts thereunder. On June 19, 1980, Petitioner pleaded not guilty to all counts.

Prior to the trial, the United States Attorney filed a Motion in Limine

to strike certain language contained in the scheme and count seven of the Superceding Indictment. Upon the granting of this motion, the U.S. Attorney then prepared a draft of a third indictment, which eliminated the language of the scheme and count seven of the Superceding Indictment, and submitted this draft to the Court to be used in lieu of the Superceding Indictment. The unsigned draft of the indictment substituted counts seven, eight and nine for counts eight, nine and ten of the Superceding Indictment.

On September 15, 1980, the matter was called to trial. In a conference held prior to the commencement of trial, from which Petitioner was excluded, Petitioner's counsel requested a bench trial. Following the conference, the trial court stated the following in the courtroom, in the presence of Petitioner:

> All right, now we have taken this up in Chambers. Am I to understand, I suppose I should have it on the record, is it true that the defendants [sic] wish to waive the Jury in this matter?

Petitioner's counsel, not Petitioner, responded, "Yes, sir, that's the position". The government also agreed to the waiver of the jury trial. The Court then stated that it approved the waiver of the jury and accepted the case as a non-jury matter. No written waiver was signed by Petitioner nor was he interrogated by the Trial Court as to the consequences of a bench trial or his waiver of the constitutionally guaranteed right to a jury trial. At no time during the proceedings did Petition express verbally or by his conduct, unless silence can be considered consent, a desire to waive a jury trial.

Trial commenced without a jury and lasted seven (7) days, whereupon the Trial Court took the matter under ad-

visement. On October 17, 1980, the Court found Petitioner not guilty on counts one, two and three, and guilty as charged on counts four, five, six, seven, eight and nine of the Superceding Indictment. This resulted in Petitioner being found guilty of a count that had been dismissed.

A motion for special findings, which was filed on October 20, 1980, was denied by the Trial Court as being two (2) days late and, therefore, untimely under Rule 23(c) of the Federal Rules of Criminal Procedure.

Petitioner was sentenced to three (3) years imprisonment; however, the execution of the prison sentence was suspended and Petitioner was placed on active probation for a period of five (5) years. As a special condition of Petitioner's probation, he was ordered to perform public service work for eight (8)

hours a week over a period of fifty-two (52) weeks and was further ordered not to serve as a primary investigator on any research project during the time of his probation. Petitioner has completed the public service work special condition of his probation.

Petitioner filed his Notice of Appeal on December 12, 1980. On February 2, 1981, after retaining present counsel, Petitioner ordered, from the Official Court Reporter of the Trial Court, the transcription of the first day of trial, up to and including the swearing in of the first witness, and copied this designation to the United States Attorney. On February 4, 1981, notice was given to the United States Attorney that Petitioner intended to rely solely upon non-compliance with Rule 23(a) of the Federal Rules of Criminal Procedure in that there was

neither oral or written waiver of trial by jury.

On March 18, 1981, the transcript and record was lodged in the Court of Appeals for the Fifth Circuit with the Petitioner filing his brief on April 7, 1981. On April 9, 1981, the United States Attorney filed a Motion to Supplement the Record on Appeal by including the entire transcript of the trial. On April 13, 1981, the United States Attorney filed a revised Attachment to Supplement the Record in the Trial Court by taking evidence of what had occurred in the conference prior to trial.

Out of an abundance of caution, in response to the United States Attorney's Motion, Petitioner filed a Motion to Stay in the Appellate Court, contending that the United States' motion was, in actuality, a "motion to enlarge the record", and that such a motion was exclusively

within the jurisdiction of the Appellate Court. Petitioner's Motion to Stay was denied by the United States Court of Appeals for the Fifth Circuit on April 16, 1981, without written reason.

Hearings were held on April 17 and 20, 1981 by the Trial Court and, on April 23, 1981, the United States District Court issued a Minute Entry relative to the motion of the United States to supplement the record and the Court's recollection of what transpired at the Pretrial Conference. This Minute Entry also corrected the anomaly of Petitioner having been found guilty of a count that had been dismissed. On November 20, 1981, the United States Court of Appeals for the Fifth Circuit rendered its opinion affirming the decision of the Trial Court.

REASONS FOR THE ALLOWANCE OF THE WRIT

MAY IT PLEASE THE COURT:

The United States Court of Appeals for the Fifth Circuit has analogized the trial of this case to a "bear garden", a Victorian custom where a bear was chained to a stake and set upon by wild dogs. The mistake made by the Fifth Circuit was the casting of the trial judge in the role of the chained and baited bear, when it was Petitioner who was tied and baited as follows:

1. The refusal of the trial judge to allow any reference at the trial to the presence in the original indictment of the dismissed counts charging activities that are legitimate and do not constitute crimes;

2. The indictment of Petitioner's chief defense witness one

(1) working day prior to trial, thus precluding testimony from Petitioner's immediate supervisor;

3. The refusal to grant specific findings after the amendment of the verdict, despite timely request before the amendment (Rule 23(c) of the Federal Rules of Criminal Procedure);

4. The inclusion in the record of proceedings held outside the presence of Petitioner (Rule 43(a) of the Federal Rules of Criminal Procedure); and

5. The improper taking of new evidence by the United States after the record on appeal was lodged and Petitioner's brief was filed, and the untimely enlargment of the record five (5) times by Respondent, despite Petitioner's proper and

timely compliance with Rule 10(b)(3) of the Federal Rules of Appellate Procedure.

If the above does not show Petitioner was tied and baited throughout the trial and appeal, one needs only to read two (2) of the felony counts on which the verdict was based, such as the purchase of books ($93.35, Count Eight) or the use of a micro lens (total value $350.00, Count Four), each of which constituted a single felony, punishable by five (5) years incarceration. The above are not constitutional issues, but merely give some insight into a gross miscarriage of justice.

The constitutional issues in this case are (1) the defendant's constitutionally guaranteed right to a trial by jury and (2) the waiver of this right.

Does Rule 23(a) of the Federal Rules of Criminal Procedure require

that a waiver of jury trial be in writing?

Rule 23(a) of the Federal Rules of Criminal Procedure, drafted and submitted by this Court to Congress, unequivocally requires a waiver of trial by jury to be in writing. The wording of the Rule could not possibly be clearer on this point. Thus, the first question for decision by this Court is the existence vel non of any exceptions to the seemingly absolute requirement of a written waiver. It is submitted that any exceptions to the safeguard of a defendant's guaranteed right provided by this Rule would infringe upon the right and thus defeats the very purpose of the Rule.

Does the Constitution require that a waiver of the right to a jury trial be intelligent, knowing, express and personal and does the failure of the trial judge to take steps to ascertain the presence of these essential elements require reversal?

Over and above the question of the requirement of a written waiver, the Court is faced in this case with another issue, namely, the consequences of a trial judge's failure to properly interrogate a defendant to ascertain that the waiver is made voluntarily, with full knowledge and free will, and is thus an effective waiver. In fact, the only cases which have recognized an exception to the requirement of a writing referred to above has taken pains to state that such an exception only exists when the trial judge has taken appropriate steps to make certain that there was an intelligent, knowing, express and personal waiver by interrogation of the defendant in open court.

In United States v. McCurdy, 450 F.2d 282, (9th Cir. 1971), the court stated the following:

> Ideally, counsel in the present case would have called to the attention of the trial judge the provisions of Rule 23, and McCurdy's signature on the appropriate form would have been obtained. However, there was an intelligent, knowing, and express waiver by the defendant in open court, with the consent of both counsel, and with the approval of the trial judge given after appropriate questioning of the defendant. Where such a waiver is spread upon the record we held that there has been compliance with Rule 23(a).

In fact, the old Fifth Circuit, prior to bifurcation, has found in accord with the above quoted passage in United States v. Lockwood, 604 F.2d 7 (5th Cir. 1979):

> ... We need not consider whether an oral waiver will suffice, cf. Horne v. United States, 264 F.2d 40, 41 42 (5th Cir.), cert. denied, 360 U.S. 934, 79 S.Ct. 1460, 2 L.Ed.2d 1549 (1959), because this record contains nothing that would indicate that the defendant, by his words or conduct, waived his right to a trial by jury. ...

A conflict in the circuits exists which demands the Court's attention. While neither the Federal Rules of Criminal Procedure nor the Sixth Amendment

specifically require a trial judge to interrogate a defendant prior to the acceptance of waiver, the District of Columbia Circuit has held that a waiver of the right to trial by jury should be accepted by a trial judge after fulfilling "the severe and weighty responsibility ... of determining whether this is an intelligent waiver by the accused." United States v. David, 511 F.2d 355 (District of Columbia 1975) at p. 360. Additionally, the Seventh Circuit has adopted a rule requiring such a procedure under penalty of reversal. See United States v. Scott, 583 F.2d 362 (7th Cir. 1977), at p. 364.

It is submitted that the District of Columbia and Seventh Circuits are correct and that the Constitution requires that a waiver of the right to trial by jury be voluntary, intelligent and expressed personally by the defendant, thus necessi-

tating a Boykinization of a defendant before the trial can proceed to the court alone. Anything less creates the risk of the constitutional guarantee of right to trial by jury becoming an ineffective safequard against the violation of a defendant's rights, thereby depriving the provision of any substantive meaning. See Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (U.S. 1969).

CONCLUSION

This case presents questions of law which this Court should decide because the Fifth Circuit has decided a federal question in a way in conflict with applicable decisions (Rules) of this Court, namely, the failure to adhere to the literal meaning of Rule 23(a) of the Federal Rules of Criminal Procedure. Additionally, the Fifth Circuit has rendered a decision which conflicts with the decisions of other federal courts of appeal on the same matter. A writ of certiorari should be allowed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James G. Burke, Jr., Attorney of Record for the Petitioner and a Member of the Bar of the United States Supreme Court, certify that I have served by United States Mail three copies of the foregoing Petition for a Writ of Certiorari upon the Solicitor General of the United States, first class postage prepaid, by addressing an envelope containing same to him at his official address and posting same at the United States Post Office, Main Branch, Loyola Avenue, New Orleans, Louisiana, this 14th day of January, 1982.

All parties required to be served have been served.

JAMES G. BURKE, JR.

Appendix

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Clayton R. PAGE, III,
Defendant-Appellant.

No. 80-3998

United States Court of Appeals,
Fifth Circuit.

Nov. 20, 1981.

Defendant was convicted before the United States District Court for the Eastern District of Louisiana, Frederick J. R. Heebe, Chief Judge, of mail fraud and of having made false claims and false statements to agencies of the United States, and he appealed. The Court of Appeals, Gee, Circuit Judge, held that (1) record supplementation procedure, undertaken when difference arose over what occurred at pretrial conference, was proper, and (2) defendant could not complain of manner in which trial court carried

out his wishes to be tried by court alone without jury, notwithstanding that waiver of jury trial was not in writing as required by rule.

Affirmed.

1. Criminal Law - 1110(6)

Where account of pretrial conference at which defendant's attorney stated that both he and defendant had decided to waive jury and try case to court was omitted from record as filed, as soon as difference arose over what occurred at that conference, Government promptly moved under rule governing correction or modification of record to remedy omission, and trial court then conducted hearing, with counsel for both sides present, and prepared minute entry detailing what went on at pretrial conference, record supplementation procedures was proper. F.R.A.P. Rule 10(e), 28 U.S.C.A.

2. Criminal Law - 1110(3)

Under rule governing correction or modification of record, what in fact went on below may be settled and placed of record and whatever proceedings are necessary to that end are permissible, but new proceedings of a substantive nature, designed to supplement what might have been done but was not, are beyond reach of rule. F.R.A.P. Rule 10(3), 28 U.S.C.A.

3. Criminal Law - 1035(2)

Where trial counsel represented in chambers that he and defendant had conferred at length and deliberately made a considered, tactical decision that bench trial would be to defendant's advantage and that he therefore wished jury discharged and case tried by court alone, truth of representations was further borne out by conduct of defendant, who was a learned, articulate man suffering

neither language nor perceptive difficulty, and neither defendant nor his counsel ever objected at trial or requested new trial, defendant could not complain of manner in which trial court carried out his wishes, notwithstanding that waiver of jury trial was not in writing as required by rule. Fed. Rules Cr. Proc. Rule 23(a), 18 U.S.C.A.; U.S.C.A. Const. Art. 3, Sec. 2, cl. 3.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GEE and RUBIN, Circuit Judges, and SPEARS*, District Judge:

GEE, Circuit Judge:

Page, the holder of a doctoral degree in parasitology and a former university biology professor, appeals his

* District Judge of the Western District of Texas, by designation.

criminal conviction of mail fraud and of having made false claims and false statements to agencies of the United States. His sole point for reversal is that the trial court erred in approving a waiver of jury trial. Implicated are the dual Constitutional guarantees of trial by jury[1] and the provisions of Rule 23(a), Federal Rules of Criminal Procedure, providing, in part pertinent here, for trial by jury "unless the defendant waives a jury trial in writing ...." (Emphasis added) It is undisputed that the defendant neither executed any writing which waived a jury nor personally took any other affirmative action to do so. The record, in a supplement added pursuant to

1. U.S. Const. art. 3, Sec. 2, cl. 3, provides: "The Trial of all crimes .... shall be by Jury ...." The sixth amendment states: "In all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial jury ...."

10(e), Federal Rules of Appellate Procedure, indicates that Page's attorneys stated to the trial court, in a chambers conference out of Page's presence, held while the venire waited in the courtroom, that (as that court expressly stated) "he and his client, Dr. Page, had given considerable thought over the [immediately preceding] weekend to the question of whether to try this case to the jury or to this Court, and that both he and the defendant had decided to waive the jury and try this case to the Court because they both decided that a bench trial was preferable to a jury trial." Thus the defendant, by his agents, his retained attorneys, directly represented to the Court below that it was his considered decision to seek a bench trial. This private representation was followed by a public one: after the conference, the trial judge stated in the courtroom, in

the presence of Page,

> All right, now we have taken this up in Chambers. Am I to understand, I suppose I should have it on the record, is it true that the defendants [sic] wish to waive the Jury in this matter?

Defense counsel, but not Page, responded, "Yes, sir, that's the position." The government also agreed to the waiver of the jury trial. The court then stated that it approved the waiver of the jury and accepted the case as a non-jury matter. Page voiced no objection, and the court did not directly question him on the subject. We note as well the absence of record testimony by Page's trial lawyers[2] disputing the indicated representations made to the trial court, though a hearing was held on the government's Rule 10(e) motion at which such evidence could have been offered.

2. Page is represented by other counsel on appeal.

Rule 10(e)

[1] The record circumstances related, and Page's contentions based upon them, present narrow but somewhat novel questions. The first is his claim that Rule 10(e) does not authorize such a record supplementation as was made here. We do not agree. That rule provides:

> (e) Correction or Modification of the Record.
>
> If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

In the terms of the quoted rule, something material to a party--the United States--was omitted from the record as filed. This was an account of the pre-trial conference, a conference that had in fact "occurred in the district court" and which was necessary to "truly disclose" what went on there. As soon as a "difference" arose over what occurred at that conference, a matter which became apparent with the filing of Page's opening brief to us, the United States promptly moved in the district court under Rule 10(e) to remedy the omission. The trial court conducted a hearing, with counsel for both sides present, and prepared a minute entry detailing what went on at the pre-trial conference.[3] This

3. The United States plausibly suggests that a court reporter had not been present there since no one other than defense counsel anticipated that a motion to waive jury trial would be made.

is before us via supplemental transcript.

We see no merit in Page's objections to this procedure. The predecessor of Rule 10(e), in virtually identical language, was applied by the Third Circuit to admit the trial court's statement of an important portion of the actual trial that had not been recorded by the court reporter. Marron v. Atlantic Refining Co., 176 F.2d 313 (1949, cert. denied, 339 U.S. 923, 70 S.Ct. 611, 94 L.Ed. 1345 (1950). And we have ourselves held proper for consideration on appeal a trial court's certificate describing events and circumstances, mostly of a non-verbal nature, that took place during a trial. Cockrell v. Ferrier, 375 F.2d 889 (5th Cir. 1967). See 9 Moore's Federal Practice ¶ 210.08[1] (2d ed. 1948 & Supp. 1980-81).

[2] As authority for his position, Page advances two of our holdings. The

earlier of these, United States v. Smith, 493 F.2d 906 (5th Cir. 1974), is not apposite. That case concerned an attempt to have the district court, pursuant to Rule 10(e), change what went on below by modifying stipulations and making additional findings. As we said there, "Rule 10(e) exists to allow the district court to conform the record to what happened, not to what did not." Id. at 907. The later, United States v. Lockwood, 604 F.2d 7 (5th Cir. 1979), also concerned a request for further substantive proceedings by the district court and the making of additional findings on the issue of waiver. The distinction to be made is a tolerably fine one, but real: What in fact went on below may be settled and placed of record pursuant to Rule 10(e) and whatever proceedings are necessary to that end are permissible. New proceedings of a substantive nature, de-

signed to supply what might have been done but was not, are beyond the reach of the rule. Settling what went on at this pre-trial conference falls in the former category. Doing so was proper.

Waiver and Invited Error

Recapitulating briefly, then, the record properly before us shows Page's trial counsel, at a conference held on the brink of trial and with the venire sitting outside in the courtroom, assuring the court that he and Page have thought the matter over with care and deliberately decided to waive the jury and try his case to the court. Government counsel at first objects but agrees after consulting higher authority. All parties having advised that they agree on waiver and a bench trial, the court observes that it will state this fact on the record in open court. It does so in the presence of Page, a highly educated

and articulate man, who in no manner exhibits objection or surprise as his counsel waives jury trial on the record and the venire is dismissed. The trial proceeds, Page is convicted and he comes to us via new counsel complaining that he gave no effective, personal waiver, written or oral, of his constitutional right to be tried by a jury.

We commence our inquiry with the observations that it would have been better to do as the rule directs and that much could be said for enforcing it strictly as to such an entire waiver of jury trial. The right involved is a precious one; and a mechanical application of the express, bright-line provision of Rule 23(a) safeguarding it would not be wholly amiss: no written waiver signed by the

defendant, no bench trial.[4] We need not explore these difficult matters here, however, since it is apparent that if the court fell into error, it was led there by Page and his trial counsel.

4. We recognize and do not question our authorities upholding oral waiver, under Rule 23(b), of a full jury of twelve, e.g., United States v. Smith, 523 F.2d 788 (5th Cir. 1975), cert. denied, 424 U.S. 973, 96 S.Ct. 1475, 47 L.Ed.2d 742 (1976). A cogent argument can be made that under the rule of Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930), a jury of less than twelve in a criminal case is no jury at all, and hence that whatever passes muster to waive the twelfth juror must suffice to waive all. We neither accept nor reject this contention today since we need not, and therefore should not, do so. We do note that the language and structure of Rule 23(a) differ from those of Rule 23(b), that the provisions of Rule 23(a) can be and probably are more stringent than constitutional requirements, and that a bench trial in a criminal case is far more different from a jury trial, whether to eleven jurors or to twelve, than a jury trial to ten or eleven jurors is from one to a full jury.

[3] We are entitled, as was the trial court, to accept the chambers representations of trial counsel that he and Page had conferred at length and deliberately made a considered, tactical decision that a bench trial would be to Page's advantage and that he therefore wished the jury discharged and the case tried by the court alone.[5] The truth of these representations is further borne out by Page's own conduct--observed by

5. E. g., Castilleja v. Southern Pacific Co., 455 F.2d 183 (5th Cir. 1971) (within trial court's discretion to accept and rely on counsel's representation of witness's unavailability). Considering the nature of the charges, that Dr. Page, a professor at a renowned university, had defrauded the university by submitting false travel vouchers and the United States by making false statements to it, a tactical reason for the maneuver is readily apparent, for there was at least a plausible reason for Page and the experienced counsel who then represented him to conclude that a judge might approach the case more objectively and dispassionately than a jury.

the trial court and noted in its minute entry--that of a learned, articulate man suffering neither language nor perceptive difficulty. The court granted his request and did as he wished. Neither Page nor his counsel ever objected at trial or requested a new trial, waiting instead until now to urge correction of this oversight. It follows ineluctably that Page cannot complain to us of the manner in which the trial court carried out his wishes. "A defendant cannot complain on appeal of alleged errors invited or induced by himself, particularly where, as here, it is not clear that the defendant was prejudiced thereby." United States v. Lewis, 524 F.2d 991, 992 (5th Cir. 1975), cert. denied, 425 U.S. 938, 96 S.Ct. 1673, 48 L.Ed.2d 180 (1976), and cases cited. The court did what Page, explicitly by counsel and implicitly by his own conduct, asked it to do. Page

will not now be heard to say that the court fell into technical error in the process of effectively carrying out his request. To do so would be to make of the courtroom a bear-garden, casting the trial judge as the bear.

AFFIRMED.

Opposition



Supreme Court, U.S.
FILED
FEB 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1336

In the Supreme Court of the United States

OCTOBER TERM, 1981

CLAYTON R. PAGE, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1336

CLAYTON R. PAGE, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he is entitled to reversal of his conviction because his waiver of a jury trial was not made in person and in writing, as is required by Rule 23(a) of the Federal Rules of Criminal Procedure.

Following a bench trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted of making false claims against the United States, making false statements to a federal agency, and mail fraud, in violation of 18 U.S.C. 287, 1001, and 1341. He was sentenced to three years' imprisonment, suspended in favor of five years' probation. As a condition of probation, petitioner was required to perform eight hours of public service work each week for one year (Pet. 8-9; Pet. App. A-5).

1. Prior to trial, at a conference in chambers, petitioner's attorneys indicated that petitioner wished to waive his right to a jury trial and wished to go to trial before the court alone. In particular, defense counsel stated that petitioner "had given considerable thought over the weekend to the question of whether to try this case to the jury or to this Court," and that petitioner had decided to waive the jury and have a bench trial instead (Pet. App. A-5 to A-6). In the courtroom after the chambers conference, the trial court asked, in petitioner's presence (Pet. App. A-7):

> All right, now we have taken this up in Chambers. Am I to understand, I suppose I should have it on the record, is it true that the defendants [sic] wish to waive the Jury in this matter?

Defense counsel responded, "Yes, sir, that's the position" (Pet. App. A-7). The government acquiesced, the court approved the waiver of a jury, and the case was tried to the court. Petitioner, the holder of a doctoral degree in parasitology and a former university biology professor, did not object to the waiver proceedings or to the bench trial (Pet. App. A-4, A-7).

2. Petitioner argued in the court of appeals that his waiver of his right to a trial by jury was inadequate. The court of appeals held, however, that on the facts of this case, any deficiencies in the waiver proceedings were not sufficient to call for reversal. While noting that the district court should have obtained a written waiver directly from petitioner, as provided by Fed. R. Crim. P. 23(a), the court declined to adopt a per se rule requiring reversal for any deviation from the requirements of that rule (Pet. App. A-13 to A-14). The court concluded that it could accept the chambers representations of defense counsel that he and petitioner had conferred at length and had "deliberately made a considered, tactical decision that a bench trial

would be to [petitioner's] advantage" (Pet. App. A-15). The truth of these representations, the court observed, was borne out by the subsequent conduct of petitioner, "a learned, articulate man suffering neither language nor perceptive difficulty" (Pet. App. A-16). In light of the circumstances, the court held that petitioner should not be heard to complain about what he asked the court to do, "explicitly by counsel and implicitly by his own conduct" (Pet. App. A-16).

3. Petitioner contends that his waiver of a jury trial was invalid and that his conviction should therefore be reversed. While Rule 23(a) was concededly violated in this case, neither the Constitution nor the rule itself requires that any failure to comply with the rule must result in automatic reversal. Rather, the proper inquiry is whether the waiver of the right to trial by jury was voluntary and intelligent. *Patton* v. *United States*, 281 U.S. 276 (1930). Whether or not there is a voluntary and intelligent waiver of the right depends upon the unique circumstances of each case. *Adams* v. *United States ex rel. McCann*, 317 U.S. 269 (1942).

In this case, as the court of appeals pointed out, the circumstances convincingly established that petitioner's waiver of a jury was knowing and intelligent. Petitioner was a highly educated and intelligent man, as the district court observed (Pet. App. A-16). Petitioner's counsel represented to the court that he and his client had discussed at great length whether to waive the jury and had decided to do so as a tactical matter (Pet. App. A-15). The court put the waiver on the record in petitioner's presence, and petitioner "in no manner exhibit[ed] objection or surprise as his counsel waive[d] jury trial on the record and the venire [was] dismissed" (Pet. App. A-13). Under these circumstances, the district court and the court of appeals properly concluded

that petitioner had knowingly and intelligently waived his right to a trial by jury.

4. Contrary to petitioner's contention, the decision of the court of appeals in this case does not create a conflict among the circuits. In *United States* v. *Scott*, 583 F. 2d 362 (1978), the Seventh Circuit established a prospective rule requiring detailed inquiries of the defendant as a prerequisite to a valid waiver of a jury trial. However, the court did not impose that requirement as a matter of constitutional or statutory construction, but rather on the basis of its supervisory powers. The fact that the Fifth Circuit has not found jury trial waiver to be a problem of sufficient magnitude within the circuit to call for the exercise of its supervisory powers on this issue does not create a conflict among the circuits that warrants this Court's attention. In *United States* v. *David*, 511 F. 2d 355 (D.C. Cir. 1975), the court of appeals urged district courts within the circuit to conduct more complete hearings when defendants sought to waive jury trials, but it did not purport to establish a per se rule requiring reversal in any case in which such procedures were not followed. Indeed, the court in *David* reversed only because it concluded, on the basis of a close examination of the record, that the waiver in that case was not knowing and intelligent.[1]

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[1] In *United States* v. *Lockwood*, 604 F. 2d 7 (5th Cir. 1979), the court reversed because there was nothing from which the court could conclude that the defendant had by his words or conduct waived his right to a jury trial. In *United States* v. *McCurdy*, 450 F. 2d 282 (9th Cir. 1971), the court affirmed a conviction in spite of the fact that the jury trial waiver had not satisfied the requirements of Rule 23(a).

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1982

DOJ-1982-02